

Addressing Compensatory Services: CASE Review of U.S. Department of Education IEP Guidance (September 2021)

On September 30, 2021, the U.S. Department of Education Office of Special Education and Rehabilitative Services (OSERS) issued *Return to School Roadmap: Development and Implementation of Individualized Education Programs in the Least Restrictive Environment under the Individuals with Disabilities Education Act*.

Before proceeding, it is important to call readers' attention to Page 1, Footnote 3, regarding the Department's intention in publishing this document:

Other than the statutory and regulatory requirements included in this Q&A document, the contents of this guidance do not have the force and effect of law and are not meant to bind the public. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.

This footnote states the information is non-binding and simply provided to bring some clarity to current law. However, CASE believes some of the information is a mischaracterization of current law and regulations. Also, despite the non-binding nature of the document, it is possible and likely this document would be cited in a due process, State complaint, or court proceeding as the Department's interpretation of the provisions of the IDEA statute and regulations.

Since the onset of the COVID-19 pandemic, the U.S. Department of Education has sought to clarify the responsibilities of school districts in providing services to students with and without disabilities. Addressing the educational needs of students with disabilities in a virtual environment proved challenging, but for the most part school districts made their best faith efforts to help students make progress toward their IEP goals.

CASE has had the opportunity to complete a comprehensive review of this guidance in the context of the COVID pandemic, school closures, and ongoing national emergency circumstances. These circumstances have had a great deal of impact on the delivery system of special education. While CASE believes it is helpful and appropriate for OSERS to attempt to provide clarity for SEAs and LEAs in their complex work moving forward, CASE has some important concerns where OSERS guidance appears to be in conflict with applicable case law and the language of the IDEA. Specifically, CASE believes Section D of the guidance document provides a new and incorrectly expanded interpretation of "compensatory services," particularly with respect to when and whether such services are appropriate and by whom this determination is made.

As stated in the guidance document, “compensatory services” has been clearly defined and recognized by courts as an equitable legal remedy ordered by due process hearing officers and courts when it is found that a public school agency has denied a student with a disability the right to a free appropriate public education (FAPE) under the IDEA. In addition, the IDEA’s State complaint procedures provide for compensatory services as a form of corrective action that an SEA may order when it has found a failure on the part of an LEA to provide appropriate services to a student with a disability. These concepts have been dramatically and improperly shifted under this new guidance.

When there is an inability on the part of an LEA to provide a FAPE, a procedure has already been established. That procedure is distinct and apart from a legal remedy of compensatory services. When an IEP team determines a FAPE has or is not being provided (lack of progress in light of the child’s circumstances), the IEP team will reconvene to discuss the student’s current level of functioning and adjust duration and frequency of services or consider a change in services or interventions to address student needs.

This is not and has never been considered compensatory services. OSERS’ guidance clearly creates a new entitlement under the law that is not found within the IDEA. If, after regular communication with school personnel, families believe their child is not receiving a FAPE, they may then choose to challenge the LEA’s program by exercising the right to file a due process or State complaint. The results of those proceedings may be a finding that a FAPE was denied and compensatory services are necessary. At that point, the IEP team may be charged with determining *what* compensatory services will be provided, but that group is not tasked with deciding *when or whether* compensatory services are appropriate.

The use of a “make-up services through compensatory services” model as a remedy if services are not provided is in violation of the current *Andrew F.* standard of FAPE. (*Andrew F. v. Douglas County School District Re-1, S.Ct., 2017*) The standard for FAPE as now defined states, in order for an LEA to meet its obligation under the IDEA, a school district must “offer an IEP reasonably calculated to enable a child to make progress appropriate *in light of the child’s circumstances.*” This means a student’s progress rates on IEP goals are at the center of determining whether or not a FAPE has been provided. The September 2021 guidance walks away from the *Andrew F.* standard and drives a “make up for services missed” approach. This is problematic because it does not recognize the appropriate legal standard for a FAPE and may require students be provided services that are not appropriate at that point in time.

It is also important to note the Department’s March 2020 acknowledgement that “[t]he determination of how FAPE is to be provided may need to be different in this time of unprecedented national emergency” and that “[s]chool districts must provide a FAPE consistent with the need to protect the health and safety of students with disabilities and those providing education, specialized instruction, and related services to these students.”

While CASE acknowledges that some children may not have received a FAPE during the time schools were closed for in-person learning, in the large majority of these instances these circumstances were not the result of IDEA violations by the school district, but rather the unfortunate effects of a global pandemic. For those students that did not receive a FAPE, the IDEA and its regulations offer avenues to address the pandemic's impact. These methods include, first and foremost, means to promote good communication and collaboration between families and school districts through the regular IEP process or, if necessary, mediation. If those procedures do not produce a satisfactory resolution, the law provides more formal due process and State complaint procedures.

CASE has reviewed each of the questions in Section D of the guidance document and offers the following comments for consideration:

Question D-1: How should an IEP Team address the adverse impact of educational disruptions caused by the COVID-19 pandemic when developing, reviewing, or revising a child's IEP for the 2021-2022 school year?

The Department provides an appropriate answer to this question -- IEP teams should consider a number of factors, updated information on the child's performance levels, and practical considerations regarding health and safety. The main concern regarding the answer to this question is the lack of recognition that *all* students, not just students with disabilities, may have experienced interrupted learning and what that may mean for addressing the instructional needs of all students.

Question D-2: May an IEP Team revise the measurable annual IEP goals to reflect a decline in the child's knowledge and skills resulting from the disruption in instruction as a result of the COVID-19 pandemic?

The Department notes the IEP team must consider the student's "present levels of achievement, disability, and potential for growth" (citing *Endrew F. v. Douglas County School District Re-1, S.Ct., 2017*), as well as other information the team is required to consider in establishing academic and functional goals. CASE wants to ensure this does not result in lowering goals to meet present functioning, but rather that IEP teams follow the *Endrew F.* standard that requires a school to "offer an IEP reasonably calculated to enable a child to make progress appropriate *in light of the child's circumstances.*"

Question D-3: What are compensatory services?

The response to this question accurately describes the concept of "compensatory services" as "an equitable remedy to prospectively address the past failure or inability of the LEA to provide appropriate services, including those that were identified on the child's IEP." The response also states that the determination of whether compensatory services are necessary is a result of a court order or, under the IDEA regulations (Sec. 300.151(b)(1)), is a remedy that may be ordered by an SEA through the State complaint process.

Question D-4: Who should make the determination as to whether and to what extent compensatory services are needed?

It is at this juncture that OSERS' guidance deviates from the standard understanding of compensatory services as described in the response to Question D-3. While noting that "[n]either IDEA nor its implementing regulations expressly address who must make the determination of whether--and if so, what--compensatory services are necessary," and that "case law or other judicially established criteria...may be applicable," the response to this question is that IEP teams are to make this decision. This response is without any legal support where the "who" and the "whether" regarding compensatory services have long been established. While the IEP team may be tasked pursuant to court order or procedural remedy to determine *what* services will constitute compensation for any educational harm, i.e., denial of FAPE, it is not the role of the IEP team to determine *whether* compensatory services are necessary.

Question D-5: How can the IEP Team use available data about the child to inform decisions about compensatory services?

In response to this question, OSER's guidance cites factors IEP teams are required to consider in making compensatory services determinations and puts those in the context of interrupted learning during the pandemic. Again, this conflates two entirely separate concepts: addressing learning losses due to COVID (which is an IEP team decision) and making decisions about compensatory services (which is a decision that is made by courts or SEAs based upon a complaint that an LEA has violated the law and denied FAPE).

Question D-6: What are some situations in which it may be necessary to provide compensatory services to a child with a disability?

Here again the guidance confuses the process by which compensatory services are determined, stating "[a] child's IEP Team may determine that compensatory services are necessary to mitigate the impact of disruptions and delays in providing appropriate services to the child." In fact, rather than making compensatory services determinations, IEP Teams must meet—as has been occurring in school districts across the country—to determine where students' current educational needs stand and whether current IEP goals and services need to be adjusted or revised (including an increase in services that may be required due to COVID's impact). To reiterate, compensatory services are a *legal remedy* upon a finding of denial of FAPE, which requires judicial action or a State complaint result rather than a determination by the IEP team. Moreover, the guidance states the "examples are not meant to be exhaustive," indicating that perhaps a broad array of concerns that might be addressed but do not cause educational harm would now be considered "compensatory services."

Question D-7: Must States ensure that compensatory services are available for all IDEA-eligible children who need them because they did not receive appropriate services under Part B of IDEA due to pandemic-related closures and other service disruptions?

The Department's response to this question is "Generally, yes." CASE believes the response should be "Generally, no." Again, it is the position of CASE that States are to ensure compensatory services are available **if and when** it has been appropriately determined by the SEA, through the child complaint process or by a due process hearing

officer or court, that FAPE has been denied and compensatory services are warranted due to the adverse impact of an LEA's violation of IDEA. It should also be noted that a State may also have the responsibility to provide direct services to children if the LEA is unable to establish and maintain FAPE (34 CFR § 300.227 - Direct services by the SEA). While CASE agrees that IEP teams should continue to assess where students are currently to ensure IEP goals and services are reasonably calculated to enable the child to make progress and meet their current needs, "compensatory services" is a legal term of art and continued use of that term in this context will likely lead to unintended consequences.

Question D-8: Does the SEA have a role in ensuring that compensatory services needs are considered and addressed?

CASE believes States must ensure compensatory services are available **if and when** it has been appropriately determined via an SEA complaint resolution or as a result of a hearing officer or court decision that a violation of the IDEA occurred and compensatory services are warranted. The response to Question D-8 clearly puts the onus on State departments of education to exercise their general supervisory responsibilities to ensure students with disabilities receive appropriate services. SEAs are tasked with providing guidance and support to school districts and IEP teams to "assess the impact of service disruptions on individual children" and to "emphasize the IEP Team's responsibility to make individualized determinations based on the individual facts and circumstances of each child." However, this guidance should be separate from any court-ordered or State complaint remedies regarding compensatory services, other than to provide oversight when compensatory services are awarded through these processes.

Question D-9: Some States are using terms such as "recovery services" or "COVID mitigation services." Are these terms synonymous with compensatory services as defined by the Department?

The Department states these terms are not synonymous if they are used as a "broad category of educational and support services intended to mitigate or address the negative impact of pandemic-related limitations." However, the guidance contemplates that these terms could be synonymous if an IDEA process is used to make individualized determinations of service needs. Again, "compensatory services" are not the result of IEP team deliberations, but rather a legal remedy ordered to address educational harm.

Question D-10: Can compensatory services be provided to children who have graduated with a regular high school diploma or exceeded the age of eligibility for IDEA services?

What OSERS appears to miss in its response to this question is that it is very clear that, for there to be an award of compensatory services, there must be a finding that the public agency violated the IDEA and, according to courts, a finding that the child at issue was educationally harmed as a result. It is important to note there have been cases (not cited here by OSERS) where it is not shown that the child suffered educational harm (for example, because the child earned a high school diploma) and compensatory services were, therefore, not warranted. The broad "yes" response here is misleading in the context of compensatory education law and has the potential

to cause serious confusion and damage. A finding of denial of a FAPE must first be made before compensatory services are awarded. Providing an additional period of eligibility is an unusual remedy and would be awarded in a most egregious situation. While it is certainly accurate that a court might award compensatory services that might include an additional period of services, this would only be on a finding of serious educational harm. In fact, all the cases cited in this section predate the most recent reauthorization of the IDEA in 2004, indicating this remedy is rarely used. Having this response in guidance from the U.S. Department of Education may bring unnecessary litigation, the fiscal and staff implications of which may have an adverse impact on all students in a school district.

Question D-11: What funds can be used to pay for compensatory services?

CASE agrees that the use of regular IDEA Part B funds and supplemental IDEA funds appropriated under the American Rescue Plan Act (2021), as well ESSER and GEER Funds, is permitted for both types of services: those determined by an IEP team to be necessary to meet a student's current needs once "normal school operations resume" and those that an SEA, hearing officer, or court may award based upon a finding that an LEA violated IDEA and the student suffered educational harm as a result. However, the two types of services are clearly not the same and should not continue to be confused.